To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
From: Mark Tuft
Date: January 7, 2019
Re: Why Lawyers are Regulated Under the Judicial Branch and to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar

This memo addresses these issues by briefly examining the role of the Supreme Court, the Legislature, and the State Bar in the regulation of the practice of law.

The Supreme Court

The California Supreme Court has the exclusive power to regulate attorney admission to practice law in California. "In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts" (Article VI §1 of the California Constitution). In re Attorney Discipline System (1998) 19 Cal. 4th 582, 592. Such power of regulation means that the Court is vested with the inherent authority to control the admission, discipline and disbarment of persons entitled to practice law in this jurisdiction. Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 543. Virtually every state recognizes that the power to admit and discipline lawyers rests with the judicial branch of government, mainly because an attorney is viewed as an officer of the court and whether a person is authorized to practice law is considered a judicial and not a legislative matter. In re Attorney Discipline System, supra, 19 Cal. 4th at 592; and see Restatement Third The Law Governing Lawyers (ALI 2000) §1, Comments b and c.[1] Hence, the Court's inherent authority to regulate lawyers is considered a judicial function under the constitutional doctrine of separation of powers.

Lawyers have traditionally been distinguished from other professions and commercial purveyors of non-professional services who are not part of the judicial branch of government.

The right to practice law not only presupposes that the person possesses sufficient integrity, learning, and fitness to practice but also that the person acquires a special privilege and obligation to carry out a public trust in protecting the integrity of the legal system and promoting the administration of justice and confidence in the legal profession. Recent amendments to the California Rules of Professional Responsibility include these obligations in stating the purpose of the rules. California Rule of Professional Conduct 1.0(a). The concept of lawyers as "officers of the court" envisions more than simply providing legal services to a client. "A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the equality of justice." California Rule of Professional Conduct 1.0, Comment [5]; and see the ABA Model Rules of Professional Conduct, Preamble ¶ 1.

[1] According to several authorities, the judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292. *In re Shannon* (AZ 1994) 897 P. 2d 548, 571; and see Martineau, *The Supreme Court and State Regulation of the Legal Profession (1980-1981)* 8 Hastings Const. L.Q. 199.

Despite the special role that distinguishes lawyers from other service providers, the Supreme Court has acknowledged on occasion that there are certain realities about modern law practice and economic circumstances that influence the delivery of legal services. The Court recognized in *Howard v.* Babcock[2], for example, that the traditional view of law firms as stable institutions is no longer the case and that lawyer are increasingly mobile and make career decisions based on the market place rather than duties to the system of justice. The Court held in that case that there is no longer any legal justification for treating partners in a law firm differently when it comes to restrictive covenants in law firm partnership agreements than other businesses and professions.

The Court's inherent authority to regulate lawyers is not exclusive. Practice in federal court is governed entirely by federal law and federal court rules of admission and professional conduct. Federal courts and many federal agencies regulate the conduct of lawyers appearing before them. At the same time, the power of federal courts and administrative agencies to discipline attorneys appearing before them does not pre-empt California's disciplinary authority if a member of the State Bar commits acts in federal court or before a federal agency that reflect upon the lawyer's integrity and fitness to practice in California. Federal courts in California typically incorporate California's Rules of Professional Conduct and the State Bar Act as standards governing the practice of law before that tribunal. Federal agencies, such as the U.S. Patent and Trademark Office and the Internal Revenue Service, adopt and enforce standards of practice that are patterned after the ABA Model Rules.

The Court's inherent authority includes defining what constitutes the practice of law in California (*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court (ESQ Business Services, Inc.)* (1998) 17 Cal. 4th 119, 128-129) and deciding who, besides members of the California State Bar, may practice law in California (California Rules of Court 9.40 – 9.48) and in what form. *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 50 - Court is empowered to authorize and impose restrictions on the practice of law by nonprofit "advocacy" corporations.

The Legislature

The Supreme Court has historically recognized the Legislature's authority to adopt measures regarding the practice of law. "[T]he power of the legislature to impose reasonable regulations upon the practice of law has been recognized in this state almost from the inception of statehood." *Brydonjack v.* State *Bar* (1929) 208 Cal 439, 443. For example, the "duties of attorney" currently found in Business and Professions Code §6068(a) – (h), including the duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client" (§6068(e)(1)), have been integral to lawyer regulation since their enactment in 1872. The Supreme Court has long acknowledged this "pragmatic approach" to lawyer regulation and has respected the exercise by the Legislature, under the police power, of "a reasonable degree of regulation and control over the profession and the practice of law… in this state." *Santa Clara County Attys Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543-544 – "In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation;" *O'Brien v. Jones* (2000) 23 Cal. 4th 40, 48-57 – appointment of State Bar Court judges by the Governor, the Assembly Speaker and Senate Rules Committee did not violate the separation of powers doctrine.[3]

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[2] 6 Cal. 4th 409 (1993)

[3] The California State Bar is the only State Bar in the country with independent professional judges dedicated to ruling on attorney discipline cases.

The Court's traditional respect for legislative regulation of the practice of law is not viewed as an abdication of the Court's inherent responsibility and authority over the regulation of lawyers. The Court has on occasion invalidated legislative enactments that materially impair the Court's inherent power, including provisions that authorize another entity to discipline an attorney. *Hustedt v.* Workers' *Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 339-341 – invaliding statute authorizing Workers' Compensation Appeals Board to remove or suspend attorneys licensed to practice before it; *Merco Const. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727-733 – invalidating law permitting a corporation to appear in an action through a person who is not a lawyer; *In re Lavine* (1935) 2 Cal. 2d 324, 328-331 – invalidating law requiring automatic readmission of attorneys pardoned after disbarment for felony convictions.

The Court has generally respected laws enacted by the Legislature to regulate the practice of law unless the Court determines that the legislation defeats or materially impairs the Court's inherent authority over attorney admission, discipline, and disbarment. *Santa Clara County Counsel Attys. Assn. v.* Woodside*,* supra, 7 Cal. 4th at 544. Ultimately, the Court has the inherent power to provide higher standards of attorney conduct than the standards prescribed by the Legislature. *Id.*; Emslie *v. State Bar* (1974) 11 Cal. 3d 210, 225.

In addition to regulating lawyers, the Legislature has enacted statutes regulating non-lawyer service providers in providing services that do not constitute the practice of law. See, e.g., Business and Professions Code §6400 et. seq. (legal document assistants and unlawful detainer assistants); §6450 et. seq. (paralegals); §22440 et. seq. (California immigration consultants).

The State Bar

The California State Bar originally was created by the Legislature in 1927 as a public corporation by statute (Business and Professions Code §6001). Subsequently, in 1960, the State Bar became and remains today a constitutional entity within the judicial article of the California Constitution (Article VI, §9). The State Bar Act did not delegate to the State Bar, the Legislature or the executive branch, or any other entity, the Supreme Court's inherent judicial authority over the regulation of lawyers. *In re Attorney Discipline*, supra, 19 Cal. 4th at 601.

In adopting the State Bar Act, the Legislature expressly recognized that the Court retained the same inherent authority it had prior to the Act. Business and Professions Code §6087 – "Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of (the State Bar Act)."[4] The State Bar Act contains other provisions confirming the Court's inherent authority over the practice of law. (Business and Professions Code §6075 – the State Bar's assistance in matters of admission and discipline of attorneys is a method that is alternative and cumulative to the Court's inherent power; §6076 – requiring the Court's approval of the State Bar's formulation and enforcement of rules of professional conduct; §6100 – confirming the Court's inherent power to discipline attorneys, including summary disbarment.

The law governing lawyers in California is not confined to the Rules of Professional Conduct and the State Bar Act. Lawyers are also bound by other applicable law including opinions of California courts. California Rule of Professional Conduct 1.0(b)(2); *Santa Clara County Atty. Assn. v. Woodside,* supra, 7 Cal.

[4] "[S]ection 6087's express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act." *In re Attorney Discipline,* supra, 19 Cal. 4th at 600; and see *Brydonjack v. State Bar* (1929) 208 Cal. 439, 443.

4th at 548 – the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and the rules are not intended to supersede the lawyer's duty of loyalty recognized in the common law. Statutory provisions regulating lawyer conduct appear in many state and federal codes and regulations as well as in rules of courts and other tribunals.

The State Bar acts as an administrative arm of the Supreme Court in admission and discipline matters. The Supreme Court has delegated to the State Bar the power to act on its behalf in such matters, subject to the Court's review. The Court retains the power to control any disciplinary proceeding and its judicial authority to disbar or suspend attorneys. *In re Attorney Discipline,* supra, 19 Cal. 4th at 599-600.

Protecting the public is the State Bar's highest priority in exercising its licensing, regulatory and disciplinary functions. Business and Professions Code §6001.1. Every person admitted and licensed to practice law in California is required to be a member of the State Bar. Art. 1 §9 of the California Constitution; Business and Professions Code §6001, 6002. Non-admitted lawyers authorized to practice law in California are, with rare exception, required to complied with California's rules and law regulating lawyer conduct in practicing law in California.

The question to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar raises structural and policy issues that are yet to be considered. As a starting point, the State Bar currently regulates lawyers with managerial and supervisory authority over non-lawyer assistants in the provision of legal services. California Rule of Professional Conduct 5.3. This may include the lawyer's duty to supervise paralegals to ensure compliance with the regulatory provisions of Business and Professions Code §6400 – 6456. However, it is not apparent that the State Bar currently has primary enforcement authority over paralegals, legal document and unlawful detainer assistants and immigration consultants. The State Bar might become involved if the unauthorized practice of law is the primary issue.

Although the State Bar has the ability to enforce registration requirements for professional law corporations and other forms of law practice, the State Bar is not currently empowered to discipline law firms or other entities authorized to render legal services. California Rule 1.0.1(c) defines "law firm" to mean a law partnership, a professional law corporation, a lawyer acting as a sole proprietorship, an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

Depending on the structure and nature of non-lawyer participation in the delivery of legal services, and whether from a policy perspective the State Bar or another agency should regulate non-lawyers or entities rendering legal services in California, the Supreme Court will likely have the ultimate say over the matter.

From: Bridget Gramme – ABS/MDP subcommittee
Date: January 7, 2019
Re: Very Preliminary Research on Multidisciplinary Practice (MDP)

As the State Bar of California's Task Force on Multidisciplinary Practice reported in its 2001 report, "IN its narrowest sense, the issue of MDP is a call to determine whether lawyers should be able to join with nonlawyer professionals as financial co-equals in a practice form which delivers mixed legal and non- legal professional services to consumers…" In its broadest sense, the issue is a call to consider whether the current traditional systems by which legal services are delivered to consumers are fully addressing consumer needs in the marketplace and, if not, what evolution and development of those delivery systems by the profession are warranted." See 6/29/01 report

Accounting Profession

This issue has most frequently arisen in the context of the big accounting firms and a series of articles have recently been written about the role of the Big 4 and their legal departments:

- https://www.law.com/americanlawyer/2018/11/29/big-laws-trojan-horse-are-the-big-four-preparing-an-invasion/
- https://www.law.com/2018/12/14/the-big-four-are-coming-for-your-clients/
- https://www.law.com/2018/07/12/lawyers-and-accountants-collaborators-and-competitors-in-the- multidisciplinary-age/?slreturn=20190007175507
- https://www.law.com/sites/ali/2017/09/13/elephants-in-the-room-part-i-the-big-fours-expansion- in-the-legal-services-market/
- https://www.law.com/sites/ali/2017/09/26/elephants-in-the-room-part-ii-the-future-of-the-big-four-in-the-legal-market/

Elder Law

This excerpt from the "Advising the Elderly Client" treatise highlights the ways in which MDP can be used to provide access to justice to more vulnerable populations and is worth further consideration:

> Advising the Elderly Client
> June 2018 Update
> A. Kimberley Dayton, Julie Ann Garber, Robert A. Mead, and Molly M. Wood
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> § 3:21. Note on multidisciplinary practice debate
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> The bar in recent years has become captivated by the multidisciplinary practice (MDP) debate.[5] Although the American Bar Association in 2000 reaffirmed its longstanding institutional opposition to MDP,[6] some

[5] The MDP debate has been the focus of literally hundreds of law review and journal articles and other commentary in the last several years. For a small sampling of this materials, see generally, e.g., American Bar Association, Commission on Multidisciplinary Practice, Report and Recommendation to the House of Delegates (May 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_hod_transc.html; Multidisciplinary Practice Symposium, 32 Loyola U.-Chi. L.J. 543–691 (2001); Business Law Symposium: Multidisciplinary Practice, 36 Wake Forest L. Rev. 1–215 (2001); The Future of the Profession: A Symposium on Multidisciplinary Practice, 84 Minn. L. Rev. 1083–1654 (2000); Symposium: Multidisciplinary Practice, 20 N.Y.L. Sch. J. Int'l & Comp. L. 153–96 (2000) (transcript of symposium proceedings).

states are on the verge of permitting some forms of MDP and many others are studying the issue. For the elder law practitioner, the controversy over MDP is of special importance. The nature of an elder law practice requires that lawyers consult often with other professionals, particularly those involved in health care, gerontology, and financial planning; indeed, many established elder law firms have on staff such non-traditional professional employees as nurses, psychologists, social workers, and gerontologists.[7] Model Rule Rules 5.3[8] and 5.4[9] presently require attorneys to supervise non-lawyer employees to prevent

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[6] Multidisciplinary Practice (July 17, 2000) (urging states to evaluate the issue of MDP with reference to "core values" of legal profession, which values preclude, inter alia, fee-sharing with non-lawyers), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html.

For information on the status of MDP rule consideration by state bar associations, see American Bar Association, Commission on Professional Responsibility, Summary of State MDP Activity (January 18, 2005), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_summ.html.

[7] For several articles discussing the benefits to clients of collaboration between elder law attorneys and gerontology professionals, see NAELA Quarterly, Spring 2000, pp. 2–27. See also, A. Frank Johns, Multidisciplinary Practice and Ethics Part II—Lawyers, Doctors, and Confidentiality, 6 NAELA J. 55 (2010).

[8] Model Rules of Professional Conduct (ABA) Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- 1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- 2. the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[9] Model Rules of Professional Conduct (ABA) Rule 5.4 (Professional Independence of a Lawyer) provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- 1. an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- 2. a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- 3. a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

their unauthorized practice of law, and preclude fee-sharing with non-lawyers. Rules allowing MDP could benefit elder law attorneys seeking to provide the full set of professional services that an older client base requires by allowing forms of collaboration between attorneys and other professional concerned with the welfare of the elderly. The controversy surrounding the MDP debate ensures that there will be little consistency among state rules of professional conduct. Thus, it is imperative that practitioners stay abreast of developments in their own states regarding this important topic.[10]

Experiences with Foreign Jurisdictions

UK

- Overview of UK's regulation of the legal profession: https://uk.practicallaw.thomsonreuters.com/7-633-7078?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk
- This article gives an example of PwC integrating its legal practice in the UK in to an MDP organization. https://www.lawgazette.co.uk/practice/pwc-integrates-legal-arm-with-uk-business-to-launch-mdp/5058041.article

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(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- 1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- 2. a nonlawyer is a corporate director or officer thereof; or
- 3. a nonlawyer has the right to direct or control the professional judgment of a lawyer.

The ABA's Standing Committee on Ethics and Professional Responsibility recently interpreted this rule to permit the formation of partnerships with foreign lawyers, "as long as the foreign lawyers are members of a recognized legal profession in the foreign jurisdiction". See ABA Formal Ethics Opinion 01–423 (September 22, 2001).

[10] American Bar Association, Center for Professional Responsibility, Status of Multidisciplinary Practice Studies by State (and some local bars), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_action.html. For a concise and frequently updated chart showing each state's activity on the MDP issue, see https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_action.html.

§ 3:21. Note on multidisciplinary practice debate, 1 Advising the Elderly Client § 3:21

Ireland, etc.

See attached report prepared by Alison Hook of Hook Tangaza in the UK assessing the MDP model for the Irish Legal Services Regulatory Authority, and gathering examples of MDP in several foreign jurisdictions including UK, Australia, New Zealand, and Canada.

Based on my conversation with Alison, a key takeaway from the experiences of countries who have adopted MDP is that they started off permitting it but providing such onerous regulations that no one took advantage of it. Not until the regulations were liberalized in this regard did they see MDP take off in the UK. I have asked her for the text of the rules that they have in effect and will circulate when receive them.

Additionally, as reflected in the report to Ireland, a key driver of MDP is its usefulness in rural areas – something that we should explore for many areas in California where access to legal services is sparse.

See also Excerpt from § 25.02 REGULATION OF THE PRACTICE OF LAW, LDKBK § 25.02

[37] Rule 5.4 Attorney Independence

Despite ongoing interest in Multi-Disciplinary Practice (MDP), for example, a business practice joining lawyers, accountants, and MBAs, under current rules, attorneys can form partnerships with other attorneys--but not with anyone else.

In 2001, the ABA issued a Formal Opinion permitting U.S. lawyers to form partnerships or alliances with foreign attorneys and firms, who will not be considered non-lawyers for Rule 5.4 purposes. The foreign lawyer must be recognized as a lawyer in his or her home jurisdiction, and the arrangement must be lawful in both jurisdictions. [ABA Standing Comm. on Ethics & Prof'l Responsibility Formal Op. 01-423, 70 L.W. 2288 (Aug. 22, 2001).]

The ABA reported in 2015 that nine states (Colorado, Delaware, Florida, Georgia, New Hampshire, New York, Oregon, Pennsylvania, Virginia, and the District of Columbia) permit "FIFO" (fly in, fly out): non-U.S. attorneys will be permitted to render general legal services, on a limited basis and for a short time. Pro hac vice admission of foreign attorneys, which requires judicial approval, is permitted in those states and also in Illinois, Maine, Michigan, Ohio, Texas, Utah, and Wisconsin. [Jacob Gershman, *New York Weighs Plan to Let Foreign*

Attorneys Practice Law in State, Wall St. J., Sept. 21, 2015, *available at* WSJ.com.]

Non-attorneys (except for executors or other estate representatives of deceased attorneys) cannot own interests in law practice P.C.s. Non-lawyers cannot serve as officers or directors of law P.C.s. Non-lawyers (other than clients) are not permitted to control legal matters or regulate practice by attorneys. [However, D.C. Bar Legal Ethics Op. 322, 72 L.W. 2571 (Feb. 17, 2004) allows non-lawyers to be "joint venturers" with law firms.]

Washington, D.C. has permitted non-lawyer ownership of law firms since 1991, but it is the only U.S. jurisdiction to do so. (The United Kingdom and Australia allow outside investment in law firms.) [Matthew Huisman, *ABA Commission Shelves Nonlawyer Ownership Policy Change*, Nat'l L.J., Apr. 17, 2012, *available at* law.com.]

Other than payments to decedent attorneys' estates, and referral fees to nonprofit referral organizations, attorneys are not allowed to share their legal fees.

Attachments:

Multi-Disciplinary Practices Report by Legal Services Regulatory Authority
http://lsra.ie/en/LSRA/s119%20Report%20Final%20April%202017%20pdf.pdf/Files/s119%20Report%20Final%20April%202017%20pdf.pdf